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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re A.B., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. JACOB B., Defendant and Appellant.	D049882 (Super. Ct. No. J510612H)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

Jacob B., the biological father of A.B., appeals the judgment terminating his parental rights under Welfare and Institutions Code[1] section 366.26. Jacob contends his

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1 All statutory references are to the Welfare and Institutions Code unless otherwise specified.

due process rights were violated because he was not given proper notice at the beginning of A.'s dependency case and not allowed to establish his paternity before the permanent planning hearing was set. Jacob also contends he was not afforded effective assistance of counsel.

FACTS

A. was born in late February 2006 and tested positive for opiates and methamphetamine. Her mother, Denise L., had a history of drug use. Denise's seven other children had been dependents of court, and Denise did not reunify with any of them. Denise identified A.'s father as Jacob, who she said was in custody at the Richard J. Donovan Correctional Facility (Donovan). Although Denise was married at the time to Michael L., she insisted that he could not be A.'s biological father because he was incarcerated when A. was conceived.

On March 2, 2006, the San Diego County Health and Human Services Agency (Agency) filed a dependency petition on behalf of A., alleging she was at substantial risk of harm because she tested positive for methamphetamine, Denise had a long history of abusing drugs, and Jacob, the alleged father, was incarcerated and unable to stop Denise's drug use. (§ 300, subd. (b).)

At the detention hearing that day, the juvenile court appointed counsel for Jacob and detained A. in foster care. The court ordered the court clerk to serve Jacob with a copy of the petition. On March 6, 2006, the clerk sent the minute order of the detention hearing to Jacob at his last known address, which was the home of his mother in

Fallbrook. The following day, the clerk mailed the petition and advisements to Jacob by registered mail to the same Fallbrook address.

On March 4, 2006, the social worker located Jacob at Adelanto Community Correctional Facility in San Bernardino County, where he recently had been transferred, and interviewed him by telephone. Jacob said he was A.'s father and wanted a paternity test. Jacob also suggested his mother (the paternal grandmother) as a prospective caretaker for A. Jacob told the social worker that he was excited and happy when Denise told him that she was pregnant with his baby; he was willing to have his name put on the baby's birth certificate. According to Jacob, he took Denise to a hotel to get her off drugs and did not allow her to use drugs. However, Jacob was arrested in June 2005. He was scheduled to be released on April 6, 2006.

On March 6, 2006, Denise told the social worker that in addition to Jacob, Greg M. could be A.'s father.

On March 30, 2006, Greg and Michael appeared at the jurisdiction hearing. Michael denied being A.'s father and, as to him, the court entered a judgment of nonpaternity. The court ordered Jacob and Greg to undergo paternity tests on April 6. The court asked the paternal grandmother, who was at the hearing, to inform Jacob of the dates for the testing and upcoming court hearings.

On April 7, 2006, the day after Jacob was released from prison, he underwent a paternity test.

Jacob made his first court appearance at the April 10, 2006 settlement conference and advised the court that he had taken a paternity test.

On April 19, 2006, at the contested jurisdiction/disposition hearing, the court found notice had been given as required by law. The court sustained the petition, declared A. a dependent child, removed her from Denise's custody and denied Denise reunification services pursuant to section 361.5, subdivision (b)(10) and (11). The court, sitting in El Cajon, transferred the case to the Vista Superior Court.

On April 24, 2006, the paternity test results showing Jacob was the biological father of A. were filed with the court.

On May 31, 2006, the paternal grandmother wrote to the court requesting assistance in obtaining custody of A.[2]

On August 29, 2006, at the scheduled section 366.26 hearing, the court confirmed Jacob as A.'s biological father and granted the request by Jacob's attorney for a contested section 366.26 hearing. The court also granted A.'s caregivers de facto parent status over Jacob's objection.

On September 21, 2006, Jacob filed a section 388 petition, which asked the court to vacate the section 366.26 hearing and order reunification services for him. As changed circumstances, Jacob alleged that he had established paternity and regularly visited A. The petition also alleged that A. "would benefit from being placed with the biological family."

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2 The grandmother also filed a notice of intent to petition for writ review of the April 19 hearing. We dismissed the notice of intent, finding the grandmother lacked standing.

On October 3, 2006, the court granted a hearing on Jacob's section 388 petition and ordered Agency to provide services to Jacob.

On November 28, 2006, after several continuances, the court conducted the evidentiary hearing on the section 388 petition and the contested section 366.26 hearing.

Jacob testified he received the genetic test results in August 2006 and tried to contact his attorney to have the court make a finding that he was A.'s biological father. However, the attorney did not respond to Jacob's telephone calls. Jacob said he had been trying to establish he was A.'s father from the outset of the case, including visiting her, enrolling in an online parenting course and attending Narcotics Anonymous meetings.[3] Jacob was living with the paternal grandmother in Fallbrook, and, according to Jacob, the home was sufficient for a child. Jacob said he always asked the caregiver about A.'s health and medical needs when he talked to the caregiver.

Bonnie B., the maternal grandmother, testified that Jacob set up the visits with A. The grandmother went along with Jacob on visits except for three or four times. The grandmother's first visit was in May 2006, and she visited A. 10 to 13 times. The grandmother said she sat and looked at A. during the visits; A. screamed most of the time.

Adoption social worker Jennifer Sovay testified that Jacob's visitation was inconsistent. Sovay said Jacob failed to visit or contact A. from mid-July to November

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3 At the time of the hearing, Jacob had completed two weeks of the 10-week parenting course.

12, 2006. Sovay opined there was no parent-child relationship between Jacob and A. because of the lack of regular visitation, A.'s young age, and his limited interaction with her when he visited. A. had become attached to her caregivers and viewed them as her parents. Sovay opined that A. would suffer detriment if she were removed from her caregivers.

Susan R., the foster mother who had cared for A. since she was three days old, testified that Jacob has visited the child 12 times. Jacob did not show up for approximately four scheduled visits and did not telephone to cancel the visits. Jacob's visits with A. lasted from five minutes to one hour. A. cried during the entire visit because she did not know Jacob. Except for a couple of minutes during one visit, A. never allowed Jacob to hold her. Jacob never fed A. nor changed her diaper. Susan said the only time Jacob asked her about A.'s medical condition was when the child had to be hospitalized overnight for a sleep apnea test.

The court denied the section 388 petition. The court found Jacob had shown a change of circumstance (establishment of his paternity), but had not shown that granting the petition would be in A.'s best interests. The court terminated parental rights and selected adoption as A.'s permanent plan.

DISCUSSION

I. *Jacob's Due Process Rights Were Not Violated*

Jacob contends the termination of his parental rights must be reversed because he was deprived of his due process rights when he was denied the opportunity to establish

paternity before the juvenile court set the section 366.26 hearing. The contention is without merit.

Legal Background

In juvenile dependency law there are three types of fathers: presumed; biological; and alleged. (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.) A father's status is important because it determines his rights in the dependency case and the extent to which he may participate in the proceedings. (*Ibid*.) A presumed father, as defined by Family Code section 7611,[4] is entitled to appointed counsel, custody (if there is no finding of detriment) and reunification services. (*Ibid*.) A biological father is an individual whose paternity has been established, but who has not shown that he qualifies as the child's presumed father under Family Code section 7611. (*In re Zacharia D.* (1993) 6 Cal.4th

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[4] Family Code section 7611 reads in pertinent part: "A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with section 7540) or Chapter 3 (commencing with section 7570) of Part 2 or in any of the following subdivisions: [¶] (a) He and the child's natural mother are or have married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court. [¶] (b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce. [¶] (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation. [¶] (c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) With his consent, he is named as the child's father on the child's birth certificate. [¶] (2) He is obligated to

435, 449, fn. 15.) The juvenile court may provide reunification services to a biological father if it finds that such services will benefit the child. (§ 361.5, subd. (a).) An alleged father is a man who might be the father of a child, but whose biological paternity has not been established. (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.) An alleged father does not have a current interest in a child because his paternity has not yet been established. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1406.) Accordingly, alleged fathers have significantly fewer rights than biological fathers and presumed fathers. An alleged father is not entitled to appointed counsel or to reunification services. (*In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1120.) The due process rights of an alleged father are satisfied by giving him notice, and an opportunity to appear, assert a position, and attempt to change his paternity status. (*Ibid*.)

A. Jacob's Claim Under Section 316.2

Jacob contends he was deprived due process at the beginning of the case because notice was not sent to the prison at which he was housed, and he was not provided with Judicial Council form JV-505─Statement Regarding Parentage (JV-505) as required by section 316.2, subdivision (b).

Section 316.2, subdivision (a) requires the juvenile court to inquire about the identity of all presumed or alleged fathers at the detention hearing or as soon after as feasible. Section 316.2, subdivision (b) provides:

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support the child under a written voluntary promise or by court order. [¶] (d) He receives the child into his home and openly holds out the child as his natural child."

> "If, after the court inquiry, one or more men are identified as an alleged father, each alleged father shall be provided notice at his last and usual place of abode by certified mail return receipt requested alleging that he is or could be the father of the child. The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. Judicial Council form Paternity-Waiver of Rights (JV-505) shall be included with the notice."[5]

Form JV-505 informs an alleged father that he can compel the court to determine his paternity and is a vehicle for the alleged father to request appointment of counsel, state his belief that he is the father of the child, and ask the court to enter a judgment of paternity. (*In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1121.)

As to sending notice to the Fallbrook address of Jacob's mother rather than his custodial prison, we find no error. An alleged father is entitled to notice that is reasonably calculated to apprise him of the proceedings and afford him an opportunity to

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5 California Rules of Court, rule 5.635, which implements section 316.2, subdivision (b), reads in pertinent part: "(a) The juvenile court has a duty to inquire about and, if not otherwise determined, to attempt to determine the parentage of each child who is the subject of a petition filed under section 300 . . . . [¶] (b) At the initial hearing on a petition filed under section 300 . . . and at hearings thereafter until or unless parentage has been established, the court must inquire of the child's parents present at the hearing and of any other appropriate person present as to the identity and address of any and all presumed or alleged parents of the child. . . . [¶] . . . [¶] (g) If, after inquiry by the court or through other information obtained by the county welfare department or probation department, one or more persons are identified as alleged parents of a child for whom a petition under section 300 . . . has been filed, the clerk must provide to each named alleged parent, at the last known address, by certified mail, return receipt requested, a copy of the petition, notice of the next scheduled hearing, and *Statement Regarding Parentage (Juvenile)* (form JV-505) unless: [¶] (1) The petition has been dismissed; [¶] (2) Dependency . . . has been terminated; [¶] (3) The parent has previously filed a form JV-505 denying parentage and waiving further notice; or [¶] (4) The parent has relinquished custody of the child to the county welfare department."

object. (See *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.) Jacob was identified on the dependency petition as an alleged father and the Fallbrook address was listed as his address. The Fallbrook address was Jacob's last known address before he was incarcerated. When Denise identified Jacob as A.'s father, she told the social worker that he was in custody at the Donovan facility. Denise did not know that Jacob had been transferred to the Adelanto facility. Section 291, subdivision (a)(7) provides the court clerk shall give notice to an adult relative residing within the county if the residence of the parent is unknown. Under these circumstances, use of the Fallbrook address was reasonably calculated to apprise Jacob of the proceedings. Further, Jacob has shown no prejudice from the use of the Fallbrook address to provide notice.

As to the statement regarding parentage, the record contains no evidence that Jacob was served with form JV-505, and we decline to presume he was under Evidence Code section 664, as suggested by Agency. Failure to provide form JV-505 in accordance with section 316.2, subdivision (b), and California Rules of Court, rule 5.635(g) (former rule 1413(g)) was error. (See *In re Paul H.* (2003) 111 Cal.App.4th 753, 761.)

However, errors in notice do not automatically require reversal. (*In re Angela C.* (2002) 99 Cal.App.4th 389, 393-394.) We review such errors to determine whether they are harmless beyond a reasonable doubt. (*Id*. at pp. 392-395.)

At the March 2, 2006 detention hearing, the juvenile court appointed counsel for Jacob. When Jacob was interviewed by the social worker on March 4─two days after the petition was filed─he told the social worker that he was A.'s father and wanted a paternity

test to prove it. Thus, whether someone advised him or he gained knowledge of his rights in some other manner, Jacob knew that he could request a paternity test to establish he was the father of A. and promptly did so. Further, on March 30, the court ordered paternity testing for Jacob. Jacob promptly underwent the paternity test on April 7—the day after he was released from prison. Jacob also attended the settlement conference on April 10. Under these circumstances, we find beyond a reasonable doubt that Jacob would not have received a more favorable result had form JV-505 been sent to him.

To the extent Jacob argues he "would have been declared a presumed or *Kelsey S.* (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*)) father but for the juvenile court's failure to afford the opportunity to assert that claim," he is mistaken.

Jacob did not qualify as a presumed father because he did not meet the requirements of Family Code section 7611. (See footnote 4, *ante*.) Jacob was never married to Denise, they never attempted to marry, and they did not jointly execute a voluntary declaration of paternity. (Fam. Code, § 7611, subds. (a)-(c).) Although Jacob openly held A. out as his child, he did not receive A. into his home; both are required to satisfy Family Code section 7611, subdivision (d). (See *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585.)

Nor did Jacob qualify as a *Kelsey S.* father. In that adoption case, our Supreme Court recognized that in some cases an unwed father may be thwarted in his attempts to establish presumed father status, such as when the mother unilaterally prevents it. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849; see also *In re Sarah C.* (1992) 8 Cal.App.4th 964, 972.) In such cases, the juvenile court "must consider whether [the biological father] has

done all that he could reasonably do *under the circumstances*" to show his commitment to parenting the child. (*Kelsey S.*, *supra*, at p. 850, italics added.) The Supreme Court held:

> "If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities – emotional, financial, and otherwise – his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection . . . ." (*Id*. at p. 849.)

Putting aside Jacob's waiver of the *Kelsey S.* issue because he did not request a *Kelsey S.* finding below (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 582), we conclude on the merits that Jacob was not a *Kelsey S.* father. First, Denise did not unilaterally prevent Jacob from attaining presumed father status. (See *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 451.) Second, although Jacob came forward promptly and also arranged visitation, he did not sufficiently demonstrate his commitment to his parental responsibilities to qualify as *Kelsey S.* father. Jacob missed a number of visits, and at one point did not visit A. for 75 days. When he did visit A., the visits lasted from five minutes to one hour. Jacob held A. only once. He never fed A. and never changed her diaper. It is not surprising that A. did not know who Jacob was and cried throughout most of the visits. Furthermore, Jacob had completed only two parts of a 10-part parenting course.

"[E]ven a *biological* father's 'desire to establish a personal relationship with a child, without more, is not a fundamental liberty interest protected by the due process

clause.'" (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 160.) "'"Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." [Citation.]'" (*Ibid*., quoting *Lehr v. Robertson* (1983) 463 U.S. 248, 260.)

II. *Ineffective Assistance of Counsel Claim Fails*

Jacob contends his trial counsel was ineffective for failing to (1) challenge the court's failure to provide section 316.2 notice, (2) ask the court to strike the allegation against Jacob from the section 300 petition because he no longer was incarcerated, (3) request a continuance at the dispositional hearing to get results of the paternity test before the court denied reunification services and scheduled a section 366.26 hearing, (4) request a special hearing and/or file a section 388 petition for four months after the paternity test results were available, and (5) be present at critical hearings and be available to his client.

Section 317.5 provides that all parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel. "'Although this right is merely statutory, it has been interpreted in substantially the same manner as the constitutional right to the effective assistance of counsel. [Citation.]'" (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 463.)

Jacob bears the burden of proving that his counsel's representation was deficient, and that such deficiency resulted in prejudice. (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.) "First, there must be a showing that 'counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms.'

[Citations.] Second, there must be a showing of prejudice, that is, [a] 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

As to Jacob's claim regarding section 316.2 notice, we have concluded that the error in not providing him with form JV-505 was not prejudicial because Jacob knew of his right to request a paternity test and counsel was appointed for him at the detention hearing. (See pt. I, *ante*.) We reject Jacob's assertion that he could have established presumed father status early in the case and without a paternity test but for counsel's deficient performance in this area.

Jacob next claims that, in light of his April 6, 2006 release from prison, counsel should have asked the court to strike the allegation regarding him in the section 300 petition. Jacob maintains this would have made him a nonoffending parent, which would have helped him establish himself as a presumed father. (See *In re Baby Boy V.* (2006) 140 Cal.App.4th 1108.) We find no prejudice. Jacob's incarceration at the time A. was born had nothing to do with whether he was a presumed father or a *Kelsey S.* father. Also, *In re Baby Boy V.*, *supra*, at pages 1114 through 1115, is distinguishable because in that case the father was denied the opportunity to establish he was a biological father.

Regarding counsel's failure to request a continuance of the contested jurisdiction/disposition hearing in order to first receive the paternity test results, Agency concedes that requesting a continuance "may have been the best practice." However,

there is nothing in the record indicating that the court would have granted such a continuance. Moreover, counsel told the court that once the paternity test results showed that Jacob is the father, counsel would seek a special hearing and request reunification services. Thus, failure to request a continuance was not deficient or prejudicial.

With respect to counsel's failure to request a special hearing and/or file a section 388 petition in a timely fashion, Agency concedes a special hearing should have been set shortly after the paternity test results were available. We agree. The question remains whether this failing was prejudicial. For purposes of this appeal, we will assume that the court would have ordered reunification services upon learning Jacob was the biological father under section 361.5, subdivision (a), and therefore, Jacob would have had a case plan no later than June 1, 2006. Sovay, the adoption social worker, testified that she assisted Jacob with visitation and discussed parenting classes with him. The social worker also said a case plan for Jacob would require him to take parenting classes, obtain stable employment and housing, and "maybe some counseling services." Before the court ordered reunification services on October 3, Jacob had stable employment and housing, was visiting A., and knew he needed to take parenting classes if he were to have A. placed with him. Therefore, Jacob essentially had the same opportunities to show his parental responsibilities as he would have had if the court had ordered services by June 1. Moreover, given A.'s young age, Jacob might have had only six months to show sufficient improvement to preclude the setting of a section 366.26 hearing. (§§ 361.5, subd. (a)(2), 366.21, subd. (e) [court may terminate reunification services after six months for children under three years].) Further, Jacob's limited efforts during the course

of the proceedings did not augur well that he would have accomplished this. Under these circumstances, we cannot say that there is a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*In re Emilye A.*, *supra*, 9 Cal.App.4th at p. 1711.)

Jacob's final complaints are that his counsel did not personally appear at the March 30 and April 19, 2006 hearings and did not return his telephone calls. Jacob was represented at those hearings by counsel specially appearing for his counsel, which is a common practice in dependency cases. As to not returning telephone calls, Agency concedes this "is a valid complaint." We agree. However, we do not find that but for this shortcoming the result would have been different. Given this record, even if counsel had returned Jacob's telephone calls promptly and had scheduled a parentage hearing earlier, it is unlikely that Jacob could have established a beneficial parent-child relationship under section 366.26, subdivision (c)(1)(A), thereby precluding termination of his parental rights.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.